No. 12,062

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT H. GAULDEN,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY and
PACIFIC FRUIT EXPRESS COMPANY,
Appellees.

APPELLANT'S REPLY BRIEF.

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THE ISSUES.

Appellant in this reply brief deems it necessary to reiterate the main issues in this appeal. Appellees in their brief would have this Court believe that the only issue herein is whether an employee of a refrigerator car company is *per se* an employee of a common carrier by railroad under the Federal Employers' Liability Act. (45 U.S.C.A. 51.)

For the sake of clarity appellant again asserts the issues as follows:

Appellant contends that the appellee, Pacific Fruit Express Company, at the time of his accident, was the agent of the appellee, Southern Pacific Company,

and not an independent contractor, by virtue of the written agency agreement (R54) between the appellees, and particularly in view of the right of control therein given appellee, Southern Pacific Company, a common carrier by railroad, in the manner in which the work was to be done under said contract, and furthermore by virtue of the Southern Pacific Company's right to supply labor and materials in fulfillment of the contract provisions.

Appellant also asserts that the Federal Employers' Liability Act being remedial and humanitarian in nature, the Courts after the liberalizing 1939 amendment should construe liberally the phrase "common carrier by railroad". Points 2 and 3 of appellant's original brief are also issues asserted and again referred to. (See Appellant's Brief, p. 8.)

CORRECTING APPELLEES' STATEMENT OF FACTS.

Appellees would have this Court believe that appellant was not engaged in any work to provide service for the appellee, Southern Pacific Company, because the Pacific Fruit Express Company handled ice for other railroads at Bakersfield, yet they are bound by their admissions in their answers to appellant's interrogatories in which it is admitted that the icing service rendered by Pacific Fruit Express Company under its Protective Service Contract of July 1, 1942 between it and Southern Pacific Company and Union Pacific Company applied only to Southern Pacific Company in regard to the service under said Contract

by Pacific Fruit Express Company at Bakersfield on June 7, 1946 at the time of the accident to plaintiff. (R51)

Appellees further admitted that all switching in and out of the unloading and icing tracks at Bakersfield was done by Southern Pacific Company's switch engines and crews and in this sense all iced reefers leaving the Pacific Fruit Express Company's plant at Bakersfield made their initial movement by engines under the control and management of Southern Pacific Company. The mere fact that Pacific Fruit Express Company serviced other railroads at Bakersfield is immaterial.

In its preliminary statement appellees in its brief misquote the facts by stating that Gaulden was injured while unloading ice from a railroad car. The stipulation and order filed herein (R19), signed by both counsel for appellant and appellees, state that appellant's duties were the "icing and moving of cars". Both the complaint (R2) on file herein and the answer (R7) show that after appellant had unloaded ice from a refrigerator car he was injured while in the act of a railroad movement, to wit, the moving of a certain empty car when a loaded ice car to the rear was being pulled up to the unloading platform by a cable and winch, and that at said time and place, and while plaintiff was pushing said empty car, pursuant to the order of a foreman, a wheel of the loaded ice car ran over his leg, which was smashed and later amputated.

Appellees in their brief assert that the Contract between them does not mean what it clearly says and that the Contract provisions making Pacific Fruit Express Company the agent of Southern Pacific Company does not mean an agency. Appellant contends the terms of the Contract are self explanatory.

DISTINGUISHING APPELLEES' CASES.

Appellees claim that the case of *Reynolds v. Addison Miller Co.,* 143 Wash. 271, 255 Pac. 110, is on all fours with the issue herein. Appellant contends that this case is clearly distinguishable from the issue herein, in that the facts of the *Reynolds* case clearly show that the Northern Pacific Railway Company's arrangement with the Addison Miller Co. for icing its cars was one wherein the Addison Miller Co. was an independent contractor. The Addison Miller Co. had no agency contract with the Northern Pacific Railway Company. In the *Reynolds* case the Addison Miller Co. was the lessee of an ice platform from the Northern Pacific Railway Company and agreed by contract to supply ice to the railroad for ten years at a fixed price per ton. Reynolds, an employee of the Addison Miller Co., was injured while loading ice. The contract between the railroad and the icing company had no agency feature such as in the contract involved here, and the railroad only had the right to inspect the work done to see if the contract was complied with. The case is clearly distinguished from the issue here where the appellee, Southern Pacific Company,

under its agency contract had an absolute right of control, and in the Southern Pacific Company's contract with the Pacific Fruit Express Company, the appellee, Southern Pacific Company, is given the right to furnish its own employees and equipment. Furthermore, in the instant case, the appellee, Pacific Fruit Express Company, is owned fifty per cent by the appellee, Southern Pacific Company.

In order to further distinguish the present case from the case of *Reynolds v. Addison Miller Co.* we quote the facts as stated by the Court in that decision:

> "The railway company had the right to inspect the work performed by the Addison Miller Company, for the purpose of ascertaining whether it was complying with the agreement. The Addison Miller Company was to furnish all the men, supplies, and material for this work, select all its help and fix their wages, and had the exclusive power of directing them as to their duties and the time and place where they should perform them; *the railway company having no authority in any manner over such employees.*"

Contrast this with the provisions of the Southern Pacific Company's-Pacific Fruit Company's Agency Contract, particularly paragraph 8 of the Contract, which reads as follows:

> "The services called for by this contract shall be performed by the Car Line without unjust discrimination against or undue favor to the Southern System, the Union System, or any shipper. *In the performance of such service, the order of the System on whose tracks loading, un-*

> *loading, or movement takes place shall be promptly and strictly obeyed by the Car Line."*

("Car Line" has been defined by the contract to mean the Pacific Fruit Express Company.)

Paragraph 10 of the agency contract provides that the appellee, Southern Pacific Company, agrees to have its employees act as agents for the Car Line in its icing service.

The Court in the *Reynolds* case further stated:

> "The question, then, first for consideration under this act, is whether at the time of the respondent's injury he was an employee of a common carrier by railroad. To answer this question, it is necessary to determine the effect of the contract between the Addison Miller Company and the Northern Pacific Railway Company. Under the authorities, that contract was valid and constituted the Addison Miller Company an independent contractor, and its employees would not be employees of the railway company engaged in interstate commerce; nor would the Addison Miller Company itself be within the terms of the Federal Employers' Liability Act."

Appellant contends that it is quite obvious from the facts in the *Reynolds* case that the Addison Miller Company was an independent contractor. Appellant asserts that the Pacific Fruit Express Company was acting as the agent of the Southern Pacific Company, while appellees contend the Pacific Fruit Express Company in the instant case is acting as an independent contractor. As mentioned in our opening

brief, where one has a right of control over the actions of another, said latter party becomes the agent of the first party and not an independent contractor.

Appellees cite several cases to support their viewpoint. These cases are mostly cases involving the question whether the Pullman Companies and Express Companies are common carriers by railroad under the Federal Employers' Liability Act and involve cases where either the contractual arrangements were different than in the instant case or where the factual situation was different. It is important to note that none of the cases cited by the appellees as supporting their contention are cases involving an agency contract or a contract with a *right of control* such as in the case at bar.

The Supreme Court of the United States in the case of *Standard Oil Company v. Anderson,* 212 U.S. 215, 53 L. Ed. 480, holds that one in the service of another may be so transferred to the service of a third party as to become the latter's servant with all the consequences of the new relationship. The Court specifically stated

> "The master is the person in whose business he (the workman) is engaged at the time, and who has the right to control and direct his conduct."

Thus, it would seem that the Supreme Court has definitely laid down the rule that direction and right of control of work usually are determinative of the relationship of master and servant.

Appellant respectfully points out that paragraph 1 of the agency agreement between the Southern Pacific Company and the Pacific Fruit Express Company provides that

> "The Pacific Fruit Express Company shall undertake and perform, *as the agent of the Railroads,* all of the services necessary to the effective refrigeration* * *". (R57)

Paragraph 2 of the Agreement provides that

> "The Car Line agrees, *as agent for the Railroads,* to furnish ice necessary for the protection of all perishable freight handled by the Railroads * * *". (R57)

It is further significant to note that paragraph 8 of the Agreement provides that the orders of the railroad system on whose tracks loading or unloading takes place shall be promptly and strictly obeyed by the Pacific Fruit Express Company *in the services called for by this contract.* Hence, the Southern Pacific Company has a right to control the entire work done by the Pacific Fruit Express Company. Paragraph 8 of the Contract does not merely give the railroad the right to issue orders respecting railroad movement, but the right to control all services called for by the contract. This is the distinguishing feature between the agency contract here involved and the *Express* and *Pullman* cases. In the *Express* and *Pullman* cases the railroads had no right of control over the Express and Pullman Company activities other than actual railroad movements. This distinction, we

respectfully submit, is the crux of the entire issue herein.

Appellant's position reduced to a general statement is that the Southern Pacific Company by virtue of its agency contract had a right to control the entire icing procedure performed by the Pacific Fruit Express Company, and that, therefore, under the doctrine of *respondeat superior* appellant became the servant of the Southern Pacific Company, his master's master, and he is entitled to have his case submitted to a jury under the Federal Employers' Liability Act.

Appellees in their brief seem to rely on nine principal cases, each of which we shall hereafter discuss and distinguish. Appellees cite the case of *Ellis v. I.C.C.,* 237 U.S. 434, 59 L. Ed. 1036, decided in 1915. The question there involved was whether an officer of the Armour Express Lines could be forced to answer questions of the Interstate Commerce Commission. In that case there was no agency contract involved with the railroad company. The Court found that the Armour Lines was an independent contractor and stated

> "But still until Armour Car Lines is shown to be merely the tool of Armour & Company it has the general immunities we have stated."

Appellees also cite *Wells Fargo v. Taylor,* 254 U.S. 175, 65 L. Ed. 205, wherein an employee of the Wells Fargo Express was injured. The express company had a contract with the railroad company which by its terms specifically made the express company on inde-

pendent contractor. There was no agency agreement or ownership as in the instant case, nor was there any partnership between the Wells Fargo and the railroad company. The express company agreed to assume all risk and damage to its agents and employees.

In the case of *Robinson v. Baltimore & O. R. Co.,* 237 U.S. 84, 59 L. Ed. 849, decided in 1915, also cited by appellees, the case involved the status of an employee of the Pullman Company, a porter, while riding on a Pullman car attached to a Baltimore & Ohio Railroad Company train. The railroad had a contract with the Pullman Company specifically making the Pullman Company an independent contractor, and the Pullman Company and its employees waived any claims for liability against the railroad. The Court stated

> "The contract between the Pullman Company and the railroad company was introduced in evidence. Without attempting to state its details, it is sufficient to say that the case was not one of co-proprietorship (see *Oliver v. Northern P. R. Co.,* 196 Fed. 432, 435) * * * We think it to be clear that in employing its servants the Pullman Company did not act as the agent of the railroad company. The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the railroad company had the control essential to the performance of its functions as a common carrier. To this end the employees of the Pullman Company were bound by the rules and regulations of the railroad company. This authority of the

> latter was commensurate with its duty, and existed only that it might perform its paramount obligation. With this limitation, the Pullman Company supplied its own facilities * * *''

It is quite apparent that the distinguishing feature in the *Robinson* case and the case at bar is that in the *Robinson* case the railroad had no control over the handling of Pullman business other than the exigencies of the actual railroad movement. Referring once again to the agency contract involved herein, the Southern Pacific Company not only had control of the railroad movement, but according to paragraph 8 of the agency contract, complete control over the entire icing service being handled by the Pacific Fruit Express Company.

Appellees also cite *U. S. v. I.C.C.,* 265 U.S. 292, 68 L. Ed. 1024 (1924), wherein the Court held that a car company whose business consists in leasing its refrigerator cars to railroads, but which company does not use such facilities necessary for carriage, is not *per se* a "common carrier by railroad" within the meaning of the Transportation Act of 1920. This case is totally irrelevant, as there was no question here of interpretation of an agency contract such as in the case at bar.

U. S. v. Fruit Growers Assn., 279 U.S. 363, 73 L. Ed. 739, involves an Interstate Commerce Commission hearing wherein a corporation performing the service of icing refrigerator cars under a contract with a railroad company made false reports to the Commission. The Court held the refrigerator company was an inde-

pendent contractor. Here again there was no agency contract involved.

Appellees also cite *General American Tank Car Co. v. El Dorado,* 308 U.S. 422, 84 L. Ed. 361, which merely holds that a corporation owning and leasing tank cars to a railroad does not become a railroad carrier under the Interstate Commerce Commission Act.

Appellees cite *U. S. v. American Ry.,* 265 U.S. 425, 68 L. Ed. 1087, which holds the same as the former case; both, however, are irrelevant here, as there was no agency contract involved.

Appellees also cite and seem to rely on the case of *Chicago Rock Island v. Bond,* 240 U.S. 449, 60 L. Ed. 735, decided in 1916. The case involved a contract made to furnish coal needed by a railroad. The contractor was made responsible for the faithful performance of the contract and was to provide all labor, and the contract contained an explicit provision that the carrier "reserves and holds no control over him in the doing of such work other than as to the results to be accomplished." Such provision obviously made the contractor an independent contractor and the Court rightfully so held. This case can also be distinguished, in that there was no agency contract or joint control as in the case at bar.

Appellees also cite as authority in their support the case of *Drago v. Central Railroad Co. of New Jersey,* 106 Atl. 803. In that case an interstate railroad company contracted with an independent steve-

doring company, whereby for a stipulated price per ton, the stevedoring company undertook to load and unload freight of the railroad company. The stevedoring company was to select and remove its own servants, define their duties, fix and pay their wages and supervise the performance of their tasks subject only to inspection by the railroad company. Here again the Court rightly decided that the stevedoring company was an independent contractor, as there was no element of actual control by the railroad company.

The Court in analyzing appellees cases will, we feel sure, readily see the distinction between all of them and the instant case. All of the cases relied upon by appellees, were obviously from the facts, cases where an independent contractor performed services for railroad companies. In none of the cases cited by appellees was a railroad company given any right of control over the terms of the contract other than the right to inspect or to make orders required by the exigencies of railroad transportation. The clear language of paragraph 8 of the agency contract herein expressly and explicitly states that *in the performance of the services called for by this contract the orders of the railroad system on whose tracks loading, unloading, or movement takes place shall be promptly and strictly obeyed by the Pacific Fruit Express Company.* Paragraph 10 provides that the railroads agree to have their employees act as agents for the Pacific Fruit Express Company in the service involved herein.

THE CIMORELLI CASE.

Appellant relies on the cases cited in his opening brief in support of his contention that *a right of control,* such as given appellee, Southern Pacific Company, by appellee, Pacific Fruit Express Company, in the Contract betweeen them is sufficient to make appellant the employee of appellee, Southern Pacific Company, his master's master.

Rather than be repetitious appellant merely refers to the case of *Cimorelli v. New York Central R. R. Co.,* 148 Fed. (2d) 575, which is particularly in point on the issue of *right of control.*

In that case the New York Central R. R. Co. made a contract with the government whereby the railroad company agreed to maintain a storage place for war material in transit and further provided for unloading and reloading cars.

The railroad company contracted with the Duffy Construction Company for the unloading and reloading of the cars. The construction company was required to furnish its own equipment and labor. There was a special provision in the contract that the Duffy Company was to perform as an independent contractor.

Plaintiff, an employee of the Construction Company, was injured while unloading freight. The Court found that under the subcontract that only part of the work delegated to the Duffy Company was to un-

load and load the freight. The railroad superintendent selected the places where the work was to be done, what equipment was to be furnished and the number of persons to be employed in the work and the Court, as a result decided that the railroad company thus controlled the work.

The Court said at page 577 of the decision:

> "and so the first question here is whether appellee, for whom the work was being done, had given up its proprietorship of the particular business to the Duffy Construction Co. and had thus divested itself *of the right of control,* to the extent that it had no longer a legal right to terminate the work or to direct it. If appellee had done nothing to limit its rights with regard to the business which was being done for its benefit, but had retained its proprietorship of it, each person working for the Duffy Construction Company was legally subject to appellee's control while so engaged and was the employee of appellee. *Singer Mfg. Co. v. Rahn,* 132 U.S. 518, 10 S. Ct. 175, 33 L. Ed. 440; *The Standard Oil Co. v. Anderson,* 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 480."

The Court further said: "One of the tests is who has the *right of control* over the work being done".

The *Cimorelli* case has been followed by the recent case of *Pennsylvania R. Co. v. Roth,* 163 Fed. (2d) 161. Both of the above cases relied on by appellant hold that an actual exercise of control or *a right of control* over another makes such person the agent of

the person either exercising or having a right of control.

Dated, San Francisco,
January 28, 1949.

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